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HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM 1955

No. 896

PATRICK McHUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Patrick McHugh, by his attorney, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in this case on March 8, 1956, affirming an order of probation.

Opinion Below

The opinion of the Court of Appeals (Appendix A, p. 18) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1956. The petitioner filed a Petition for Rehearing on March 23, 1956. The Petition was denied on March 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

Questions Presented

I. Whether an order of probation is valid where the judgment imposed for violating sections 1 and 2 of the Sherman Anti-Trust Act (26 Stat. 209, 15 U.S.C.A. sec. 1 et seq.), merely sentences a defendant to pay a fine and there is no adjudication that a prison sentence has been suspended.

II. Whether, in view of the Norris-LaGuardia Act, (47 Stat. 70, 29 U.S.C.A. sec. 101 et seq.) and sec. 6 and 20 of the Clayton Act, (Act of October 15, 1914, chapter 323, 38 Stat. 730, as amended, 15 U.S.C.A. sec. 12, et seq.) a district court may, in a prosecution under the Sherman Anti-Trust Act arising out of an agreement between a union and an association of employers impose as a condition of probation on a defendant who is an official of that union that for two years "said defendant shall not become active, either directly or indirectly, in the operation, management, or control of" that union.

III. Whether, in view of section 4 of the Sherman Anti-Trust Act providing for a civil remedy by the Government, a district court may impose this condition of probation in a criminal anti-trust prosecution.

IV. If a district court may impose this condition of pro-

bation in a criminal anti-trust prosecution, what are the standards for its review by an appellate court.

V. Whether the imposition of this condition of probation violates the defendant's rights under the First and Eighth Amendments to the Constitution.

Constitutional Provisions, Statutes and Rules

1. The Probation Act, 18 U.S.C. 3651 provides:

"Sec. 3651. *Suspension of sentence and probation.*

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

"Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment."

(The third and remaining paragraphs of this Act are set out in Appendix B).

2. Rule 32(b) Rules of Criminal Procedure, 18 U.S.C. provides:

> "(b) *Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk."

3. Sections 1 and 2 of the Sherman Anti-Trust Act, (26 Stat. 209, 15 U.S.C.A. section 1, et seq.) provide:

> "Sec. 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

4. Section 4 of the Sherman Anti-Trust Act is set out in Appendix B.

5. Section 6 and section 20 of the Clayton Act, (Act of October 15, 1914, c. 323, 38 Stat. 730, as amended; 15 U.S.C.A. sec. 12 et seq.) are set out in Appendix B.

6. Sections 1, 2 and 3 of the Norris-LaGuardia Act, (47 Stat. 70, 29 U.S.C.A. sec. 101 et seq.) are set out in Appendix B.

7. The First and Eighth Amendments to the United States Constitution are set out in Appendix B.

Statement of the Case

In this case the petitioner challenges the validity of an order of probation. On November 15, 1951, the petitioner, Patrick McHugh, secretary-treasurer of the Atlantic Fishermen's Union, Seafarers International Union of North America, A. F. of L., that Union itself, the New Bedford branch of that Union, and various officers of the New Bedford branch were indicted together with the Seafood Producers Association of New Bedford, Mass., Inc., an association of owners of fishing boats in New Bedford, for violating the Sherman Anti-Trust Act. (R. p. 3a-5a).[1]

The indictment was in two counts. The first count alleged that the defendants through various agreements set out in paragraph 8 of the indictment (R. p. 8a) conspired to restrain the production and sale of fish in New Bedford in violation of section 1 of the Sherman Anti-Trust Act. The second count alleged that the defendants, through the same agreements, monopolized the inter-state trade in fish in New Bedford in violation of section 2 of the Sherman Anti-Trust Act.

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[1] "R" refers to the Appendix Record in the court below filed with this petition pursuant to Rule 21 of the Rules of this Court.

The indictment as originally drawn proceeded on the theory that fishermen were independent businessmen "engaging on their own account in the business of catching fresh fish," (R. p. 4a); that they "are not employees, workers or laborers" (R. p. 6a, par. 13 of the indictment) and that the fishermen "sell their catch directly to dealers" (R. p. 7a). However, in return for a commitment by the Union and the individual officers to plead nolo contendere (R. p. 25a) the Government agreed to a Motion to Strike these allegations (R. p. 11a) the purpose of which motion, on its face, was to revamp the indictment so as to exclude the allegations that the fishermen were independent businessmen rather than employees.

Accordingly, the petitioner changed his plea from not guilty to nolo contendere and on May 9, 1955, was sentenced to pay a fine of three hundred dollars. (R. pp. 29a-30a). The District Court also placed him on probation for two years "a condition of said probation being that said defendant shall not become active, either directly or indirectly, in the operation, management or control of the Atlantic Fishermen's Union, Seafarers International Union of North America, A. F. of L., and Atlantic Fishermen's Union, Seafarers International Union of North America, A. F. of L., New Bedford." (R. p. 30a).

The petitioner appealed to the Court of Appeals for the First Circuit which affirmed on March 8, 1956. A Petition for Rehearing filed on March 23, 1956 was denied on March 27, 1956.

Argument

I. The holding of the Court of Appeals that a probation order is valid although the judgment discloses that the defendant has merely been sentenced to pay a fine and there has been no adjudication suspending a sentence is incon-

sistent with Rule 32(b) of the Rules of Criminal Procedure and established principles for the construction of judgments, as well as with the Probation Act as interpreted by this Court.

The Court of Appeals recognizes, of course, "that the statute provides that there must be a suspension of sentence to support an order of probation." (Appendix A, page 23). The Court, however, infers such suspension "from the general import of the judgment." But the only basis on which a suspension of sentence can be read into this judgment is that an order of probation has been entered and that the Probation Act itself requires suspension of sentence. But to utilize the statute to supply an omission in the judgment is basically inconsistent with what this Court in *Bozza* v. *United States*, 330 U.S. 158, 166, termed the well-established rule that a sentence must "comply with the letter of the criminal statute." Thus in *King* v. *United States*, D.C. Cir., 98 F.2d 291 and *Ex parte Karstendick*, 93 U.S. 396, 399, it was held that a judgment is invalid where it neglected to state that imprisonment was to be at hard labor although the statute expressly required it. The words in the statute did not cure the omission in the judgment.

In *Hill* v. *United States ex rel Wampler*, 298 U.S. 460, this Court would not supply a condition in a judgment that the defendant stand committed until a fine was paid although that was the established understanding in the district court and was included in the commitment. The Court said:

> "The choice of pains and penalties where choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment."

The court below read the Probation Act as expressly

authorizing the omission of the suspension of sentence from the judgment.[2] But such an interpretation puts the Probation Act in conflict with Rule 32(b) of the Rules of Criminal Procedure which requires that the judgment, signed by the judge, shall "set forth . . . the adjudication . . . ". It is also clear from Note 5 to Form 25 of the Appendix of Forms to the Rules of Criminal Procedure that the adjudication includes "any order with respect to suspension and probation."

The holding of the Court of Appeals trivializes the requirement of an adjudication of suspension of sentence and reduces it to a mere technicality. But this is contrary to the purpose of the Probation Act. Historically, of course, the Probation Act was passed in response to *Ex Parte United States*, 242 U.S. 27 (commonly known as the *Killits Case*) which had denied the Federal courts the power to suspend sentences. *Frad* v. *Kelly*, 302 U.S. 312, 315. Cf. Statement of Congressman Graham, Chairman of the House Judiciary Committee, which reported out the bill which became the Probation Act, 66 C.R. 1248.

But the power to suspend sentence is not a mere device on which to hang the power to impose conditions of probation. Professor Glueck includes the suspension of sentence in one of the "indispensable elements" of probation. Glueck, "The Significance and Promise of Probation" (Glueck, Probation and Criminal Justice, page 3). The necessity for an adjudication of suspension of sentence is at the basis of *Roberts* v. *United States*, 320 U.S. 264, which goes further, holding that the trial court is bound by the adjudication it makes.

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[2] The clause relied on by the Court of Appeals merely "reflects exactly the practice followed by federal courts" (Revisor's Note) that probation may be limited to specific counts in an indictment and if not thus limited, shall be construed as extending to all the counts. *Burns* v. *United States*, 287 U.S. 216.

Furthermore, the purpose of the Probation Act has been described as an "amelioration of the sentence." *United States* v. *Murray*, 275 U.S. 347, 357, and "a humane substitute for imprisonment," Cooley, "Probation and Delinquency," page 435. The Probation Act thus contemplates an adjudication by the court that the offense deserves a sentence, but that for reasons relating to the individual involved it should be ameliorated by probation. Congress in requiring the suspension of sentence thus required an adjudication that a sentence would otherwise be appropriate —either a specific sentence, in which case its execution would be suspended or a sentence the length of which need not be presently determined, in which case its imposition would be suspended. (*Roberts* v. *United States*, 320 U.S. 264, 268.) But in either case, it is submitted, Congress intended as a requisite to probation that there be an adjudication by the court that a sentence is appropriate to the offense.

Thus Henry C. Chandler, Director of the Administrative Office of the United States Courts in "Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts" 27 Va. L.R. 825 at 846, says:

> "By far the greater part of the work of the Federal courts on the criminal side consists in deciding what sentence to adopt for convicted offenders and then in treating by probation a considerable proportion of them."

Professor Frank T. Flynn in an article "Probation and Individualized Justice" (14 Federal Probation No. 2, June 1950, p. 71[3]) describes probation as follows:

> "It is a considered judgment and a disposition which

takes into account the alternative to probation—imprisonment."

This appears to be the view of the Attorney General in 36 Op. Atty. Gen. 186. He held that a chief machinist in the Navy was "sentenced to confinement" and therefore could be dropped from the Navy although an 18 month sentence had been suspended. He reasoned (p. 189) that the suspension of sentence was an adjudication that the offense was "sufficiently serious that confinement in a penitentiary is not only authorized by the law as punishment therefor but is also regarded by the court as an appropriate punishment in the particular case." He goes on to say "the question, however, whether sentence will be suspended and probation granted depends not so much upon the gravity of the offense as upon reasons personal to the individual offender."

It is submitted that the proper administration of the Probation Act requires that a sentencing judge in ordering probation (particularly in a case such as this where it is an alternative to imprisonment, a fine having been imposed) make a conscientious and formal adjudication that in his judgment the offense is of such gravity as to require a sentence of imprisonment, but that it may be suspended because of considerations relevant to the rehabilitation of the individual defendant involved.

II. The court below affirmed the condition of probation that for two years the defendant "shall not become active either directly or indirectly in the operation, management or control of" the Union, doing so without regard to the

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[3] Published by the Administrative Office of the United States Courts in cooperation with the Bureau of Prisons of the Department of Justice.

Norris-LaGuardia Act[4] and the approach of this Court in *United States* v. *Hutcheson*, 312 U.S. 319.

The Norris-LaGuardia Act in section 2 declares it to be the public policy of the United States that employees "have full freedom of association [and] self-organization". The Act takes from the federal courts not only the power to enjoin such activities but also (by section 3) the power to enforce any "undertaking or promise in conflict with the public policy in section 2." It seems anomalous that in spite of this sweeping limitation on the power of the federal courts they can still impose this condition on a defendant and force his acquiescence in it under threat of imprisonment (assuming *arguendo* that a suspended sentence can be implied from the probation).

It hardly needs discussion that this condition is in conflict with the freedom of the petitioner as an employee and

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[4] The Government in its brief below attempted to indicate a similarity between the defendant here and the defendant in *Columbia River Packers Association* v. *Hinton*, 315 U.S. 143. But there the association was made up of boat owners and "some of their employees" (p. 144). The defendant here was the official of a union of employee fishermen who bargained with their employers, the boat owners. The district court so assumed (Record Appendix to Petition for Rehearing; R. pp. 27a-28a.) The attorney for the Government referred to the fishermen's remuneration as wages (R. p. 27a). The courts and other tribunals have long recognized that the relationship between the fishermen and the boat owners is one of employee and employer and that the "lay system" under which the fishermen work is merely a method of determining their wages. Various authorities are set out in Appendix C. In the light of the above and of the manifest purpose of the Motion to Strike (R. p. 11a) it seems clear that the allegations still remaining in the indictment that fishermen receive "a stipulated share of the proceeds" and that the "captain and crew must pay for fuel, food, ice and other expenses of a fishing trip" (R. p. 6a) can mean only that the proceeds of the catch are used as a basis for determining the fishermen's wages after the deduction of various expenses. The fishermen make a "profit or loss" (R. pp. 6a-7a) only in the sense that the unloaders did in *U. S.* v. *Silk*, 331 U.S. 704, 717-718, where the Court said: "They had no opportunity to gain or lose except from the work of their hands and these simple tools."

the freedom of the union which he represented. (*Barrows* v. *Jackson*, 346 U.S. 249). Indeed the basis for the district court's action was the petitioner's activities as a representative of employees (R. pp. 27a-28a; Record Appendix to Petition for Rehearing)—that he exerted a "compelling influence" on the employer boat owners. (R. pp. 28a-29a).

Nor is the action of the court below affirming this condition consistent with the approach to the Clayton Act in *United States* v. *Hutcheson*, 312 U.S. 319. That case revitalized section 20 of the Clayton Act which lists among activities declared lawful "recommending, advising or persuading others" to strike. Its rationale is equally applicable to section 6 which provides that the anti-trust laws shall not be construed "to forbid or restrain individual members of [labor unions] from lawfully carrying out the legitimate objects thereof."

But to read section 6 and section 20 in the light of the Norris-LaGuardia Act, as *United States* v. *Hutcheson* requires, is to read them in terms of limitations on the power of the courts. So read, they mean, it is submitted, that a court sitting in an anti-trust suit cannot interfere with the listed activities, these activities being protected by those sections. This it seems is the basis for the modification of the injunction in *Allen Bradley Company* v. *Union*, 325 U.S. 797. The court in support of the modification relies not only on the Clayton Act making the listed activities lawful but on the Norris-LaGuardia Act which is a limitation on the power of the court to interfere with such activities. It is submitted that—consistent with *United States* v. *Hutcheson* and *Allen Bradley Company* v. *Union*, and the sweeping declaration of public policy in the Norris-LaGuardia Act—the same limitation applies to the court's power to make an order of probation. Paraphrasing *United States* v. *Hutcheson*, (p. 235), it would be strange indeed that although a court could not have issued an injunction against conduct of this type,

or taken jurisdiction over a voluntary undertaking to refrain from such conduct, the elaborate efforts to prevent courts from interfering with this conduct failed to prevent the use of the Probation Act to circumvent these efforts.

III. The condition of probation here imposed is essentially a civil sanction appropriate if at all in a civil injunction suit under section 4 of the Sherman Anti-Trust Act and under the safeguards provided in Rules 65(d) and 52(a) of the Rules of Civil Procedure. Indeed, it seems that the district court intended its probation order as a civil remedy. (R. p. 29a). But other courts have not permitted the use of probation to achieve results for which civil remedies have been established. Thus in *United States* v. *Stoehr*, 3 Cir. 196 F.2d 276, the district court imposed as a condition of probation on a defendant convicted of tax evasion that he pay his taxes. The Court of Appeals held that the amount of the taxes should be determined in the civil and administrative proceedings fixed for such determinations. In *United States* v. *Chiumento*, 49 F. Supp. 551 (D.N.J.), the district court refused in a criminal prosecution under the Fair Labor Standards Act to fix the amount to be restored to employees because that Act, like the Sherman Act, has a specific civil remedy—this, moreover, in spite of an express provision in the Probation Act for restitution to aggrieved parties. *Karrell* v. *United States*, 9 Cir., 181 F.2d 981, 986-7 and *United States* v. *Follette*, 32 F. Supp. 953, (D.C.Pa.) reached the same conclusion.

This principle has also found expression in various state court cases. *State* v. *Barnett*, 110 Vt. 221. *People* v. *Prell*, 299 Ill. App. 130; *People* v. *Funk*, 117 Misc. 778, 193 N.Y.S. 302.

If this condition can be imposed in a criminal anti-trust suit then the court could order divestiture without the careful findings required as a basis for such an order. *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 127. *Timken*

Roller Bearing Company v. *United States*, 341 U.S. 593. Or a court could order a stockholder to sell his stock without anything like the full hearing required in a civil action. *Hughes* v. *United States*, 342 U.S. 353.

Moreover, Congress has never considered that the Probation Act can be used in this way although it has given attention to more effective enforcement of the anti-trust laws through some such sanction. Thus in 1939 in the 76th Congress, First Session, Senator O'Mahoney introduced S. 2719 providing a civil action to prevent officers convicted under the anti-trust laws from continuing to act for their companies. Senator O'Mahoney (*Hearings on S. 2719 before the Subcommittee of the Committee on the Judiciary, U. S. Senate, 76th Congress, First Session, part 1, revised print, page 9*) stated that the bill was necessary because "there is no effective way to invoke the penalty [of imprisonment] against the individual responsible for the offense." The bill was recommended by the United States Temporary National Economic Committee in its final report (*Senate Document No. 35, 77th Congress, First Session p. 40*).

Congressman Patman on April 27, 1949 introduced H. R. 4402 which provided that a corporate official found guilty of violating the anti-trust laws be barred from his position for a specified period. This was endorsed in the *Progress Report of the House Select Committee on Small Business, 81st Congress, 1st session.* An excerpt from that report is reprinted in the *Hearings before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, 81st Congress 2nd session, serial 14, part 3, pages 13-15.* The Report states:

> " . . . There is no sound reason why a criminal court, instead of sending a man to jail, may not be authorized to enjoin him from specified activities in

> the same way as a civil court. Criminal courts in effect enjoin activities of the defendants at the present time, by releasing them, for instance, on conditions of probation. The bill (sec. 4) expressly confers on the courts and judges necessary authority, predicated on existing general authority."

Justice Clark, then Attorney General, in discussing this bill at the hearings before this Subcommittee, (serial 14, part 1, page 82) stated:[5]

> " . . . Some people have proposed that perhaps a person convicted under the anti-trust laws should not be permitted to serve as a director or something of the kind, but I rather think that the method of divestiture and divorcement and dissolution is pretty effective."

A similar bill, S. 766, was introduced by Senator Murray on February 14, 1953. It was opposed by the legislative committee of the anti-trust section of the Illinois Bar Association as a "new and unusual penalty." *Hearings before a Subcommittee of the Committee on the Judiciary United States Senate on H.R. 2237, 83rd Congress, 2nd session, at page 13.*

None of these bills have passed. It seems significant that neither from the proponents or opponents of this type of legislation is there any hint that the Probation Act could be used to accomplish the same or similar results.

IV. If this condition can be imposed it would seem to call for a far different type of review than that accorded the ordinary condition of probation. This Court has held that even a civil injunction in an anti-trust case should be given

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[5] See also testimony of Mr. Arnall, page 277 et seq., and Mr. Hamilton, pp. 291, 292.

greater scrutiny by an appellate court than is given to other injunctions. In *Hartford Empire Company* v. *United States*, 324 U.S. 570, 571, the Court said:

> "It is unthinkable that Congress has entrusted the enforcement of a statute of such far reaching importance to the judgment of a single judge, without review of the relief granted or denied by him."

It is submitted that consistent with this approach the Court of Appeals should have exercised its own discretion on the record as to the propriety of this condition.

V. The court below justifies this condition on the basis of *Berra* v. *United States*, 8 Cir., 221 F.2d 590 which answered objections to the condition by pointing to the alternative—imprisonment. However, it is submitted that this is not an entire answer to the objection that the defendant's rights under the First and Eighth Amendments are being abridged. In the first place probation is itself a form of discipline; it can be imposed without the consent of a defendant. *Korematsu* v. *United States*, 319 U.S. 342, citing *Cooper* v. *United States*, 5 Cir., 91 F.2d 195. Furthermore, it can (at least on the basis of the few decided cases, *Hollandsworth* v. *United States*, 4 Cir. 34 F.2d 423; *Mitchem* v. *United States*, 5 Cir. 193 F.2d 55), be imposed up to five years although that be a greater period than the maximum period of imprisonment.[6]

The condition of probation here is far different from the conditions usually imposed. 2 *Attorney Generals Survey of Release Procedures*, page 239 et seq. Moreover, it goes

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[6] Indeed, that may well be so in this case. The probation order is for two years and the indictment may support only a year's sentence since both counts are based on the same acts. (R. p. 10a). *Braverman* v. *United States*, 317 U.S. 49.

much further than interference with the petitioner's means of livelihood; it interferes with rights specifically guaranteed by the First Amendment. *Thomas* v. *Collins*, 323 U.S. 516. It is submitted that the imposition of so drastic and unusual a condition in connection with a misdemeanor raises grave constitutional questions under both the First and Eighth Amendments to the Constitution.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 5009

PATRICK McHUGH,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Henry Wise, with whom *Robert L. Wise* and *Wise and Wise* were on brief, for appellant.

William J. Lamont, Attorney, Department of Justice, with whom *Stanley N. Barnes*, Assistant Attorney General, *Daniel M. Friedman*, Attorney, Department of Justice, and *Anthony Julian*, United States Attorney, were on brief, for appellee.

OPINION OF THE COURT

March 8, 1956.

HARTIGAN, *Circuit Judge*. This is an appeal by the defendant, Patrick McHugh, from a judgment entered in the United States District Court for the District of Massachusetts following his plea of *nolo contendere* to a two-count indictment charging that the defendant, among others, had combined and conspired to restrain trade and commerce in fish landed at the port of New Bedford and had monopolized that trade and commerce, in violation of Secs. 1 and 2 of the Sherman Anti-Trust Act. (26 Stat. 209, 15 U.S.C. § 1 *et seq.*).

On May 9, 1955, the defendant was sentenced to " • • • pay a fine of three hundred (300) dollars said fine to be paid within three months, and is placed upon probation for two (2) years, a condition of said probation being that said defendant shall not become active, either directly or indirectly, in the operation, management, or control of the Atlantic Fishermen's Union, Seafarers' International Union of North America, A. F. of L., and Atlantic Fishermen's Union, Seafarers' International Union of North America, A. F. of L., New Bedford."

The defendants named in the indictment were the Atlantic Fishermen's Union and its New Bedford, Massachusetts branch, unincorporated associations, five union officials, including the appellant, and the Seafood Producers Association of New Bedford, Mass. Inc.

The indictment alleged in substance: New Bedford is one of the largest fishing ports in the United States, and more than $16,000,000 worth of fish is brought into that port each year, including approximately 80% of all sea scallops landed in the United States. Many of the fishing boats are owned by members of the defendant Seafood Producers Association of New Bedford, Mass. Inc. and are operated by the fishermen pursuant to a contract between the Union and that Association. Boats manned by the Union members account for and catch in excess of 90% of all fish landed in New Bedford.

Under the terms of that contract the boat owner furnishes and maintains only the boat and gear; the captain and crew pay all the other expenses of a fishing trip, including fuel, food and ice. The fishermen control the catching and sale of fish. The boat owner has no control over the areas in which fishing will be done, the length of the voyage, or the amount of fish that will be caught on a particular trip. The contract further provides that the crew members, the boat captain, and the boat owner "each

receive a stipulated share of the proceeds received upon sale of the catch" and "Each fisherman who is a member of the crew risks making a profit or loss, according to the success or failure of each fishing trip." When the vessel returns, each boatload of fish is sold separately by the boat captain at a fish auction controlled by the Union although the Union members "do not act collectively" through the Union in producing and marketing their catch. A "substantial quantity" of the fish which the dealers in New Bedford purchase is "immediately" resold by them and shipped in interstate commerce to wholesalers and retailers in states other than Massachusetts.

Since 1943 the defendants have been engaged in a combination and conspiracy to restrain unreasonably the production and sale of fish in New Bedford. The combination and conspiracy have consisted of a continuing agreement among the defendants to limit the amount and type of fish caught; to fix and maintain prices, terms, and conditions of sales of fish to dealers in New Bedford; to compel and coerce dealers to purchase fish under terms and conditions which the defendants dictated; to require that all sales of fish in New Bedford be made through the fish auction controlled by the Union; and to boycott dealers who purchase fish from fishermen outside the auction. The defendants, in order to effectuate the conspiracy and combination, have done those things which they combined, conspired and agreed to do.

The combination and conspiracy effectively limited the quantity and species of fish landed in New Bedford, excluded non-union fishermen from the New Bedford market, prevented small dealers from purchasing fish in that port except on the terms and conditions prescribed by the defendants. Had it not been for defendants' illegal restraints, a "much greater" volume of scallops and other fish would have been brought into and sold in the port of New Bedford.

The indictment further alleges that since 1943 the defendants have monopolized trade and commerce in the production and sale of fish in New Bedford and have entered into and performed the foregoing restrictive agreements.

The appellant asserts that a plea of *nolo contendere* leaves open for review the sufficiency of the indictment and cites in support thereof *Brotherhood of Carpenters* v. *U. S.*, 330 U.S. 395 (1947). However, it is only in an exceptional situation that there can be a defense to factual allegations of the indictment following a plea of *nolo contendere*. *Brotherhood of Carpenters* v. *U. S.*, supra. We find no such exceptional situation here. As a general proposition all facts alleged in the indictment are admitted upon such a plea.

In attacking the sufficiency of the indictment, the appellant contends that the Union is not indictable in its common name, and that it therefore follows that no conspiracy was properly alleged since only one defendant, the Seafood Producers Association, was properly before the court.

It is clear that under the rule of *Brown* v. *United States*, 276 U.S. 134 (1928) the Union is indictable in the name of the Association under the provisions of the Sherman Act.

Appellant next contends that the trial court adopted the view that the Seafood Producers Association was not a voluntary partner in the conspiracy, but rather an unwilling victim of the Union.

We do not think the Union and its officers can escape liability under the Act by making the bold-faced assertion that no conspiracy existed owing to the fact that the boat owners had not entered into voluntary combination but had in fact been bullied by economic duress into unwilling compliance with the Union's demands. Perhaps this defense might be successfully maintained by the boat owners, but we do not believe it is available to the Union and its officials. Moreover, the plea of *nolo contendere* by the

Seafood Producers Association which was followed by the imposition of a fine of $2,000 clearly indicates that the court — and indeed that Association itself — was of the opinion that it had violated the Act.

Appellant also argues that for various reasons this court should take judicial notice of the fact that the defendant Union is a bona fide labor organization and not merely an association of independent fishermen. We find it unnecessary to consider this argument in any detail. Where a Union combines with business organizations in restraining competition and monopolizing the marketing of goods, it enjoys no freedom from the operation of the anti-trust laws. *Allen Bradley Co.* v. *Union*, 325 U.S. 797 (1945).

Nor need we consider whether the Fisheries Co-operative Marketing Act is applicable to this case for the reason that it could not, in any event, afford appellant exemption from the provisions of the anti-trust laws. *Hinton et al* v. *Columbia River Packers Ass'n, Inc.*, 131 F.2d 88 (9 Cir. 1942).

With respect to the validity of the sentence, it is appellant's contention, among others, that "• • • a single consolidated judgment where there are distinct offenses, different in kind, is improper," and hence void. This contention is without merit. *Ross* v. *Hudspeth*, 108 F.2d 628 (10 Cir. 1939).

There would seem to be somewhat more substance to appellant's contention that "The probation statute (U.S.C. Title 18, Sec. 3651) permits probation only on suspension of either imposition or execution of a sentence. • • • Here there was no order of suspension of any kind."

Pertinent provisions of § 3651 of the Probation Act are as follows:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against

> the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> "Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment."

We agree that the statute provides that there must be a suspension of sentence to support an order of probation. We do not believe, however, that it necessarily follows that there can be a suspension in fact only where the court makes an express statement to that effect. We think that precise language in the judgment, though much to be desired, is not absolutely essential, and that under certain conditions an intent to suspend sentence may be inferred from the general import of the judgment.

§ 3651 provides, in part: "If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment." It will be observed that this language does not by its terms require that there be any express suspension of imprisonment, thus lending some support to the view that there may be an implied suspension, at least with respect to imprisonment where the offense is also punishable by fine.

A further indication that suspension of sentence need not appear expressly on the face of the judgment may be found

in the following provision of the statute: "Probation may be limited to one or more counts or indictments but, in the absence of express limitation, shall extend to the entire sentence and judgment." It seems to us that the words "limited" and "express limitation" as they appear in the statute relate logically to the customary suspension of sentence with respect to one or more counts or indictments which ordinarily precedes and supports an order of probation. Accordingly in this connection we read the above quoted provision to mean: "Probation may be attached to the express suspension of sentence as to one or more counts or indictments but, in the absence of an express suspension, shall extend to the entire sentence and judgment."

It would appear, therefore, that the statute contemplates and authorizes the enforcement of an order of probation even in those instances where the judgment incorporates no express language of suspension.

As to the contention of appellant that the court cannot legally interfere with his " • • • right to act for his economic advance and protection as a member of a legal organization • • • ", we think that the opinion of the court in *Berra* v. *United States,* 221 F.2d 590 (8 Cir. 1955) is a sufficient answer.

The judgment of the district court is affirmed.

Appendix B

PERTINENT STATUTES.

1. The Probation Act, 18 U.S.C. sec. 3651 (3rd and remaining paragraphs):

> "The court may revoke or modify any condition of probation, or may change the period of probation.
>
> "The period of probation, together with any extension thereof, shall not exceed five years.
>
> "While on probation and among the conditions thereof, the defendant—
>
> "May be required to pay a fine in one or several sums; and
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and
>
> "May be required to provide for the support of any persons, for whose support he is legally responsible.
>
> "The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation."

2. Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C.A. section 1 et seq.

> "Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such

proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

3. Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended; 15 U.S.C.A. sec. 12 et seq.:

"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury

there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

4. Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C.A. sec. 101 et seq.

"Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of

this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

"Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

"Sec. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall

not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following: . . . "

5. United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

6. United States Constitution, Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Appendix C

THE LAY SYSTEM AND THE EMPLOYEE STATUS OF FISHERMEN.

The lay system under which the New Bedford fishermen are paid is described by Judge Wyzanski in the *Dirigo First*, 60 F. Supp. 675 (D.Mass.). In that case various New Bedford suppliers sought a lien on a New Bedford fishing boat for supplies furnished. The boat owner contended that there was no lien because the boat was operated under the lay system. Judge Wyzanski in rejecting this contention said:

> "Under this system, as in many other forms of running vessels, the owner-master, Gallant, hires a crew as his employees, directs them, determines the direction and length of the vessel's voyage and runs the risks of loss of the vessel, damage to or by the vessel, taxes on the vessel, social security taxes and liability for injury suffered by the crew. But the unique characteristic of the system is the method by which the crew is paid. When the fishing vessel returns to port, the captain arranges to have the fish sold at auction and the proceeds of the auction are then divided according to a formula called the lay. Pursuant to this formula, there are first subtracted from the total amount received at auction charges for discount, wharfage and a fee for scales. The balance is called the 'gross stock'. From gross stock, there are then deducted charges for gear, oil, light, sounding machine, watch and sometimes a special fixed compensation for the engineer known as 'engineer's per.'. The balance is called the 'net stock.' A fraction, generally one-quarter, of the net stock is paid to the owner of the vessel (who in turn pays to the master, if he be other than the owner, a fifth of that quarter as compensation or 'skipperage').

From the remaining fraction, generally three-quarters of the net stock, there are deducted charges for food, bait and the like. What remains is then distributed to the captain and the crew, each person receiving an equal share of that remainder. If no fish is caught or for some other reason there are no proceeds from a fish auction, the voyage is called a 'broker'. Then there is no gross stock, no net stock, and no remainder to be divided on shares, so that the members of the crew go unpaid, unless the owner or master chooses to make a gratuitous distribution."

In answering the defendant's argument that the lay system precludes a supplier's lien, he said:

"That argument cannot prevail. No part of the lay system and no rule of law subjects a member of the crew to liability for supplies. Under the lay system a member of the crew will not get paid, it is true, until certain charges are first met. But he has not given anyone power to order supplies for his account. He runs merely a risk of non-payment for the time he spent fishing, not a risk of being out-of-pocket. His risk of non-payment is no concern of third parties. They must continue to look for payment elsewhere. And in this case they looked to the vessel for payment.

"In short, the fact that the owner-master has agreed with the crew upon a method of calculating the crew's wages with reference to the costs of the vessel's operations and supplies and with reference to the sales proceeds of such fish as are caught does not alter the owner-master's status in ordering supplies and does not take either the vessel or those who supply necessaries outside the scope of Act of June 5, 1920, c. 250, Sec. 30, subsec. P, 41 Stat. 1005, 46 U.S.C.A. sec. 971."

The Supreme Judicial Court of Massachusetts in *Commonwealth* v. *McHugh*, 326 Mass. 249,—a proceeding in which this petitioner was enjoined by the Commonwealth from violating the state anti-trust laws—had this to say of the lay system at page 256:

> "The captains of the vessels, except a few who own their vessels, are employed by the vessel owners.[1] The captains in turn hire the crew. The fishermen, generally speaking at least, do not receive a daily or hourly wage. They are paid by a share of the proceeds of their catches called the lay. The lay is calculated after the deduction of certain expenses and charges."

Further, at page 270, the court said:

> "The defendants are employees of the vessel owners and not entrepreneurs on their own accounts. They so insist in their brief. According to former decisions of this court they do not own the fish which they catch (*Bishop* v. *Shepard*, 23 Pick. 492, 494-495; see *Adams* v. *Augustine*, 195 Mass. 289, 81 N.E. 192), although, so long as they work under the lay system of compensation, they have an interest in the price which the fish brings."

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[1] Cf. In the Matter of Arbitration between Seafood Producers Association, New Bedford, Mass., and Atlantic Fishermen's Union, Boston, Mass., July 21, 1953, No. 55A/651 in which Professor Paul Pigors in passing on the responsibility of the boat owner for a breach of the contract occurring at sea said: "Equally without substance is the contention that after a ship leaves port, the owners can exercise 'no control whatsoever.' At sea, the authority of the owners is delegated to the captains. The primary authority of the owners can make itself felt at all times. Thus there can be no doubt that owners are responsible for decisions made on their vessels and in their behalf, by their official representatives (the Captains)." See also, *O'Hara Vessels Inc.* v. *Hassett*, 60 F. Supp. 672.

The court in discussing the final decree said:

> "It is not intended that the fishermen be placed in a position inferior to that of other working men in respect to the general right to improve their condition."

Accordingly, it modified the decree by adding (page 274) the following proviso:

> "But nothing herein contained shall be construed to prevent the defendants from in good faith bargaining collectively or striking for the primary purpose of securing higher wages, a larger share of the lay, or better working conditions, even though an incidental effect may be to reduce the supply or increase the price; . . ."

Donald J. White, comments as follows on this decision, The New England Fishing Industry,[2] page 98:

> "In effect, the court told the union that it could turn only to the vessel owners, as the direct employers of the fishermen, for satisfaction on wage matters. . . . "

The employer-employee relationship between boat owner and fisherman has been the basis for decision in a variety of other situations. In the *Carrier Dove*, 1 Cir., 97 Fed. 111 (see also 93 Fed. 978) the court held that the fishermen had a lien on the vessel for wages where the captain had absconded with the proceeds of the trip. The court said:

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[2] This study was published in 1954 by the Harvard University Press as one of the Wertheim Fellowship Publications, Harvard Economic Studies.

> "They (the fishermen) had not a full right and power to select their own agent for the sale of the catch for the simple reason that they were not partners. They were hired fishermen whose wages were dependent on the success of the fishing in which they were engaged."

In *Hayes* v. *Luckenbach SS Company*, 92 F. Supp. 684, Judge McCarthy held that the captain and the crew could not recover for loss of earnings when the fishing boat on which they worked was damaged by collision. He cited *United States* v. *Laflin*, 9 Cir. 24 F.2d 683, in which the court said:

> "It has been the maritime law from the time of Oleron that agreements by which seamen engage in a fishing or whaling voyage and are to receive for their services shares of the profits of the voyage are contracts of hiring and the shares so agreed upon are in the nature of wages."

Similarly, in *Cusumano* v. *The Curlew*, 105 F. Supp. 428, 433 (D.Mass.) Judge Ford held that a part owner could recover damages for his and other part owners' loss of use of a fishing vessel but that he could recover nothing on behalf of the fishermen whose loss was merely a loss of potential wages.

The courts have uniformly held that the Jones Act providing remedies for "any seaman . . . who shall suffer personal injury in the course of his employment" is applicable to fishermen under the lay system and they may recover from the boat owner. *Nolan* v. *General Seafoods Corporation*, 1 Cir., 12 F.2d 515. *Silva* v. *Brown*, 319 Mass. 466.

In *Stevens* v. *R. O'Brien Company*, 1 Cir., 62 F.2d 632, the

court held at page 635 that the fishermen had a right to maintenance and cure "a material ingredient in the compensation for the labor and service of the seamen."

In *Hunt* v. *Trawler Brighton*, 102 F. Supp. 302 (D.Mass.) Judge Ford awarded maintenance and cure to a fisherman who had broken his leg on shore between trips. Judge Ford held that the fact that the fisherman worked under the lay system rather than under articles was immaterial. He said:

> "The argument is apparently based on the ground that in such a situation the seaman who has not signed articles is in some way less subject to the discipline and control of the master of the vessel. There is no valid justification for such a distinction nor does there seem to be any reason to make his rights as a seaman depend on the fact that his contract calls for the payment of his wages in the form of a share in the proceeds of each trip paid at the end of the trip rather than at a fixed monthly rate."

Government administrative agencies have uniformly dealt with fishermen as employees and the Atlantic Fishermen's Union as a labor organization. *Cape Cod Trawling Company*, 23 N.L.R.B. 208.

The War Labor Board took jurisdiction over disputes between the fishermen and the boat owners. *In the Matter of Federated Fishing Boats of New England and New York Inc.* and Atlantic Fishermen's Union, Atlantic District Seafarers International Union, A. F. of L., case No. 16; *Atlantic Fishermen's Union* v. *R. O'Brien Company*, Case No. 619.

The boat owners withhold taxes and pay social security for the fishermen. *O'Hara Vessels, Inc.* v. *Hassett*, 60 F. Supp. 672. (D.Mass.).